80-202

No.

Supreme Court, U. S.
FILED
AUG 11 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

AMERICAN EXPRESS COMPANY,
Petitioner,

v.

LOUIS R. KOERNER, SR.,
Respondent.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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August 11, 1980

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 78-1290

LOUIS R. KOERNER, SR., Individually and on behalf of all others similary situated,
Plaintiff-Appellant,

v.

THE AMERICAN EXPRESS COMPANY,
Defendant-Appellee.

April 7, 1980

Rehearing and Rehearing En Banc
Denied May 12, 1980

Louis R. Koerner, Jr., Terry A. Bell, New Orleans, La., for plaintiff-appellant.

Chaffe, McCall, Phillips, Toler & Sarpy, Peter Frank Liberto, Lemle, Kelleher, Kohlmeyer & Matthews, David L. Campbell, New Orleans, La., for defendant-appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before WISDOM, GOLDBERG and HENDERSON, Circuit Judges.

WISDOM, Circuit Judge:

This action involves a dispute about the coverage of the credit card provisions of the Truth in Lending Act (TILA), 15 U.S.C. § 1601 *et seq.* Section 1666, dealing with correction of billing errors, requires that a credit card issuer take certain steps before restricting or clos-

ing a credit card account. The question this case presents is whether the safeguards of § 1666 apply to an individual cardholder who is jointly and severally liable with his employer for debts charged to the card. The card issuer contends that § 1666 does not apply to transactions of a business or commercial nature and that holders of credit cards issued under a company account do not qualify as consumers. We hold that for a credit card issuer to hold an individual jointly and severally liable with his employer, the issuer must comply with the requirements of § 1666. We base our holding primarily on a principle almost as old as flour: You cannot have your cake and eat it too.

I.

On November 16, 1964, John E. Koerner & Co., flour wholesaler, applied for an American Express Card, using a company account application form. American Express requested bank and credit references only from the company. John E. Koerner, Jr., was designated as the individual authorized to receive a card in the company name. The application was approved.

The same day the plaintiff, Louis R. Koerner (Koerner), a company officer, completed a form labeled "Application for Supplementary Credit Card, Company Account". The form stated that "The undersigned individual and company join in this application and assume *joint and several liability* for all charges incurred prior to return of Credit Card to American Express Company". (Emphasis added.) American Express requested no additional bank or credit references and approved Louis Koerner's application. It approved similar applications submitted by other employees of Koerner & Co.

American Express billed the charges for all of these cards to the company on one statement, showing subtotals for the individuals. Louis R. Koerner used his

card for both personal and business charges, paying for the personal charges himself.

In 1975 a billing dispute arose between Koerner and American Express over the following charges, totalling less than $50:

> (a) Three debits in the amount of $3.00 each and one debit in the amount of either $3.00 or $6.00 for charges made by plaintiff in July, August, September, and October of 1975 for air flight insurance for trips conducted for business purposes.
>
> (b) A debit of $20.00 representing, according to plaintiff, "a charge for Mr. John E. Koerner's card which was returned and for which credit was never given." This, presumably, was a renewal fee for a card no longer desired.
>
> (c) A debit of $20.00, ultimately cancelled by a credit which plaintiff asserts was "a charge for a card of Ralph E. Koerner". The nature of the charge has not been established.

The parties agree that all of these were business charges. The dispute remained unresolved through September 28, 1976, when Koerner attempted to use his card at New Orleans International Airport to pay for an airline ticket for a business trip. The ticket salesman called American Express to check Koerner's status. The salesman handed the telephone to Koerner to speak with American Express, and, after the conversation, gave him back his card. It had been cut in two.

Koerner filed suit in November 1976, contending that American Express violated 15 U.S.C. § 1666 by wrongfully revoking his credit card as a result of a billing dispute; violated 15 U.S.C. § 1637 by not making certain periodic disclosures; and violated Louisiana law by committing a tort through its breach of contract. He

alleged that he represented a class similarly situated. The court did not certify the class. Following the recommendation of a federal magistrate, the trial court granted summary judgment for the defendant on December 8, 1977. *Koerner* v. *American Express Co.*, E.D. La. 1977, 444 F.Supp. 334. The court held that § 1666 was applicable only to credit cards issued to natural persons under a non-corporate account. The court denied the other claims because Koerner had asserted § 1637 was made applicable through § 1666 and because Koerner had stipulated that his state claim would not reach the requisite jurisdictional amount. After the court denied several post-judgment motions, Koerner appealed to this Court.

II.

TILA was enacted on May 29, 1968. The Act then contained no reference to credit card transactions and was intended to provide "a meaningful disclosure of credit terms" to consumers. *Id.* § 1601. It specifically exempted credit transactions for business or commercial purposes, or extension of credit to several types of organizations, including corporations. *Id.* § 1603. In 1970 Congress amended the Act to prevent issuance of unsolicited credit cards, *id.* § 1642, to limit to $50 the liability for unauthorized use of a card, *id.* § 1643, and to provide criminal penalties for fraudulent use of credit cards, *id.* § 1644. It also added several definitional subsections. *Id* §§ 1602(j-o).

After passage of the amendments, two circuit courts decided that the $50 liability limitation applied to corporate transactions despite the exemption in § 1603. *American Airlines, Inc.* v. *Remis Industries, Inc.*, 2 Cir. 1974, 494 F.2d 196, involved $14,008.16 in unauthorized charges on an Air Travel Card. The case was governed by a New York statute that determined liability for unauthorized use according to the limits under TILA. The

court noted that § 1643(a) limited liability of a "cardholder" to $50. A "cardholder" is defined as "any person to whom a credit card is issued or any person who has agreed with the card issuer to pay obligations arising from the issuance of a credit card to another person". 15 U.S.C. § 1602(m). A "person" is "a natural person or an organization". *Id.* § 1602(d). An "organization" includes a "corporation". *Id.* § 1620(c). The court refused to apply the § 1603 exemption to a corporation because that would raise "a threshold question for which the Act at least provides no ready answer: at what point in the credit card process does a transaction involving the extension of credit occur?" 494 F.2d at 201. One possibility is the time the card was issued. But individuals might obtain a card for business or personal purposes or both. A predominant use test would be "wholly unwieldy" because of "the extensive, overlapping use of some types of credit cards, e.g., to purchase gasoline or meals in a restaurant". *Id.* The other possibility would be that a transaction involving the extension of credit occurs when the card is used. But the unauthorized use of a card is not an extension of credit *to the cardholder*. *Id.* at 201 n. 4. Whether the unauthorized user had a business or personal purpose should not determine whether $50 limits the cardholder's liability.

The court refused to accept American Airline's argument that commercial enterprises have bargaining power that obviates the necessity for statutory protection, reasoning that the use of form contracts for credit card applications makes the process "a take-it-or-leave-it method of contract formulation". *Id.* at 202. Finally, the court cited interpretations by the two administrative bodies concerned with the Act, a Federal Reserve Board regulation, *see* 12 C.F.R. § 226.13(a)(4) (1973) (amended Nov. 2, 1972), *now codified at* § 226.2(m), and

a Federal Trade Commission decision, *In re Credit Card Service Corp. d/b/a Credit Card Service Bureau*, 82 F.T.C. 191, 209-11 (1973), *affirmed and enforced* sub nom. *Credit Card Service Corp.* v. *Federal Trade Commission*, D.C. Cir. 1974, 161 U.S.App.D.C. 424, 495 F.2d 1004. Both agencies construed TILA's credit card provisions as applicable to all cardholders, including corporations.

The second case, *Credit Card Service Corp.* v. *Federal Trade Commission*, D.C. Cir. 1974, 161 U.S.App.D.C. 424, 495 F.2d 1004, involved an attempt by the Federal Trade Commission to make Credit Card Service Corporation disclose in its advertising the $50 limitation on a cardholder's liability for unauthorized use of his card. This court also reasoned that applying the exemption to the credit card provisions was illogical. The only event that could be a credit transaction was the unauthorized use itself, and the intent of the unauthorized user should not govern the applicability of the Act. The credit card company argued that cards issued to corporations were exempted from the Act, but the court could not understand why an exemption for certain credit *transactions* should apply to a *type* of credit card. *Id.* at 427, 495 F.2d at 1007. The court rejected applying the $50 limitation only when the last legitimate use of the card before the unauthorized use was personal, apparently believing it would be logical to make liability "depend on how a card was last used before it was lost or stolen". *Id.* at 427, 495 F.2d at 1007. It foresaw practical difficulties with a predominant use test because "[a] credit card is often used for both business and personal transactions". *Id.* at 428, 495 F.2d at 1008.

In 1974 TILA was amended to enact the circuit courts' decisions that § 1603 did not apply to the $50 limitation, 15 U.S.C. § 1645, and to state that the exemption did not apply to the provisions forbidding is-

suance of unsolicited cards and imposing criminal penalties for fraudulent use of credit cards. 15 U.S.C. § 1645.

Contemporaneously, Congress adopted several other amendments to the Act, including 15 U.S.C. § 1666.

III.

The district court held that Koerner could not invoke § 1666 because it "provides its own internal qualifications, generally extending its coverage to all transactions accomplished by means of a credit card issued to a natural person under a non-corporate account and excluding all others". 444 F.Supp. at 338.[1] The court based its holding on several factors. First, the language of § 1666 suggests that it was meant to apply only to consumer transactions. The term "cardholder", which includes corporations, does not appear in § 1666. The section instead uses the term "obligor", which it never defines. Section 1666(a) lists obligations of a creditor "in connection with an extension of consumer credit". And § 1666(d) states that a creditor "operating an open end consumer credit plan" cannot restrict or close an account under certain circumstances when an obligor believes there is a billing error. Second, an interpretation letter from the Acting Chief of the Fair Credit Practices Section of the Federal Reserve Board states that the requirements of the 1974 Fair Credit Billing Act[2] do not apply to cards embossed with the names of the company and employee and used by employees for business purposes only. *See* 5 CCH Consumer Credit Guide ¶ 31.338. In that case the company was liable for payment of goods

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[1] Although the district court decided that § 1666 provides its own internal qualifications, it did look to § 1603 for guidance in determining the reach of § 1666. *See* 444 F.Supp. at 338, 40-41.

[2] This Act contained the 1974 amendments to the Truth in Lending Act. *See id.* at 337 n. 9.

or services purchased with the card, and the employee was not sent an invoice or periodic statement. The letter should of course be given great weight. *See Ford Motor Credit Co.* v. *Milhollin*, —— U.S. ——, ——, 100 S.Ct. 790, 797-799, 63 L.Ed.2d 22 (1980). Third, the court believed that the legislative history of the 1974 amendments suggests that Congress was primarily worried about purportedly "high-handed tactics of card issuers in their handling of billing complaints" by consumers. 444 F.Supp. at 341. Finally, the court noted that § 1645, which was enacted at the same time as § 1666, held that the § 1603 exemptions were not applicable to §§ 1642-1644. Had Congress intended corporations to receive the benefit of the § 1666 protections, it could have said so in § 1645.

The district court formulated a "prospective predominant use test" to determine whether § 1666 applies to an account. The test is "applied at the opening of an account and based on the reasonably anticipated predominant use thereof". *Id.* at 340. The court in effect established a presumption that in "the majority of credit card accounts opened in the name of individuals who assume sole liability for debts to be incurred, predominant usage for non-business purposes is contemplated". *Id.* "[I]n the majority of accounts opened in the names of companies and relying in large part on company credit, such as the account involved in this litigation, it would be reasonable to anticipate predominant use for business or commercial purposes". *Id.* Occasional personal use of a card should not give rise to § 1666 obligations and penalties. The court would apply its presumptions "[s]hort of a prospective expression by the parties involved negativing such an intent". *Id.* Because Koerner's American Express card came under the business presumption, he failed to state a cause of action under TILA.

There are, however, strong reasons why § 1666 should apply to transactions for business or commercial purposes or transactions involving extensions of credit to corporations. First, although "cardholder" is not used in § 1666, it is used in §§ 1666f, h, & j, companion sections to § 1666. Moreover, the Federal Reserve Board uses "customer" rather than "obligor" throughout its regulations explaining § 1666. *See* 15 C.F.R. § 226.14. One definition of "customer" is "cardholder". *Id.* § 226.2 (u). The regulations deserve as great a weight as interpretation letters. Second, it is difficult to formulate a test for application of any business exemption. A predominant usage test similar to that suggested by the district court was rejected by the Second Circuit Court because it was "totally unwieldy". *See American Airlines, Inc.* v. *Remis Indus.*, 2 Cir. 1974, 494 F.2d 196, 201. The presumptions could be easily evaded: Business could have individual employees acquire credit cards in their own names and agree to reimburse them for business uses of the card.

Determining whether § 1666 covers corporate transactions and transactions for business or commercial purposes is obviously difficult. We need not resolve that question, because a narrower ground for decision exists in this case. Koerner signed a statement joining in the application and assuming joint and several liability for any debts.[3] Therefore, American Express could recover from him or from the company. If it can recover from a consumer, then it must abide by the requirements of

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[3] Although the agreement stated that Koerner and the company had "joint and several" liability for charges incurred with the card, the correct civil law term is "in solido" liability. *See* La.Civil Code Art. 2091. The terms have the same meaning. *Johnson* v. *Jones-Journet*, La. S.Ct. 1975, 320 So.2d 533, 536; *Ford Motor Co.* v. *Soileau*, La. 3 Cir. 1975, 323 So.2d 221, 225.

§ 1666 for correction of billing errors in a consumer's credit card statement. The credit card company cannot have it both ways: If it does not want to be bound by consumer lending requirements, then it should not be allowed to collect its debts from a consumer. Although our decision prevents application of the § 1603 exemption "for business or commercial purposes" to § 1666 when an individual is liable for debts incurred, this result is consonant with the purpose of the Fair Credit Billing Act of 1974—protecting consumers from the harassment of creditors. *See* S.Rep.No. 278, 93d Cong., 1st Sess. 1-2, 4-6 (1973); S.Rep.No. 750, 92d Cong., 2d Sess. 1-4 (1972).

American Express attempts to avoid this result by arguing that Koerner is merely a surety for the company, and that the company is ultimately responsible for the debt. A repayment agreement, if any, would be between the company and the individual, and does not bind American Express. It can collect from either obligor. Although Koerner might sue the company for indemnification if the debts incurred represented business expenses, he would remain personally liable if he lost that suit or if the company was insolvent. Whether Koerner could recover his payment from the company depends upon the existence of an agreement between them and the continued solvency of the company.

American Express cannot have its cake and eat it too. We therefore REVERSE and REMAND to the district court for proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-1290

LOUIS R. KOERNER, SR., individually and on behalf of all others similarly situated,
Plaintiff-Appellant,

versus

THE AMERICAN EXPRESS COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(Opinion April 7, 1980, 5 Cir., 197—, —— F.2d ——).

(May 12, 1980)

Before WISDOM, GOLDBERG and HENDERSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the

Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Albert J. Henderson

United States Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT
E. D. LOUISIANA

Civ. A. No. 76-3660

LOUIS R. KOERNER, SR., ETC.

v.

THE AMERICAN EXPRESS COMPANY

Dec. 8, 1977

Louis R. Koerner, Jr., Stephen M. Bernstein, New Orleans, La., for plaintiff.

Peter Frank Liberto, Chaffe, McCall, Phillips, Toler & Sarpy, David L. Campbell, Lemle, Kelleher, Kohlmeyer & Matthews, New Orleans, La., for defendant.

MEMORANDUM OPINION AND ORDER

EDWARD J. BOYLE, Sr., District Judge:

Invoking the court's jurisdiction pursuant to 15 U.S.C. § 1640(e), its counterparts 28 U.S.C. §§ 1331 and 1337, and the general diversity jurisdiction statute, 28 U.S.C. § 1332, plaintiff, Louis R. Koerner, Sr., seeks injunctive relief and damages for alleged violations by American Express, Inc. (American Express) of the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601 *et seq.* Plaintiff brings these claims on his own behalf and seeks to represent an alleged class of persons similarly situated. Pendant to the claims are plaintiff's demands for relief based on an alleged breach of duties imposed upon American Express by Louisiana law.

The defendant has filed a Motion for Summary Judgment dismissing the federal claims on the grounds that

the statute claimed to have been violated, 15 U.S.C. § 1666, which deals with correction of billing errors, does not apply to transactions of a business or commercial nature and that holders of credit cards issued under a company account do not qualify as "consumers" as that term is defined in the TILA. The motion also seeks dismissal of the state claims on the grounds that they fail to meet the required jurisdictional amount. Following a hearing on the motion, a United States Magistrate rendered his report, recommending that the motion be granted on the basis that the instances of card usage which led to the alleged Truth in Lending violations were exempted from coverage by the Act and plaintiff, therefore, had failed to state a cause of action under the federal statute. Further, it was recommended that plaintiff's state claim, supportable only under diversity jurisdiction in the absence of a viable federal claim, be dismissed.[1] Plaintiff has filed timely objections to the recommendations of the Magistrate as they relate to the Truth in Lending claims, specifically asserting that the report failed to reconcile with its conclusions the case of *American Airlines, Inc. v. Remis Industries, Inc.*, 494 F.2d 196 (2 Cir. 1974). After considering the record, the memoranda of counsel in support of and opposition to plaintiff's objections to the Magistrate's Report and Recommendation, and the law applicable, we have concluded that said objections should be overruled and defendant's Motion for Summary Judgment dismissing plaintiff's complaint should be granted.

The pertinent facts, which are uncontested unless otherwise noted, are as follows:

1. On November 16, 1965, an application for a credit card was completed on a company account form. It was

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[1] In conference, plaintiff stipulated that his state claim would not reach the requisite jurisdictional amount. (*See* ¶ B of Minute Entry dated March 30, 1977, Rec.Doc. # 16).

signed by the company through one of its officers and by *John E.* K erner, Jr., who was designated as an individual authorized to receive a card in the company name. Bank and credit references were requested of and supplied by the company only. According to the application, all billings were to go to the company at its office address. Following approval of the application, the company account was opened and the card issued.[2]

2. Also on November 16, 1965, a form labelled "Application for Supplementary Credit Card, Company Account" was completed by the company through one of its officers and by *Louis R.* Koerner, plaintiff herein. No additional bank or credit references were requested. The application was approved and the card was issued.[3]

3. Apparently, additional supplementary company cards were issued to *Ralph E.* Koerner, Dennis Thomas and Carroll A. DeGeorge. All cards, including those mentioned above, were embossed with the company name and the name of the individual cardholder.[4]

4. All charges for use of plaintiff's card, as well as other company cards, were billed to the company and statements of combined billing, showing subtotals by individual cards, were mailed to it at its business address.[5]

5. From the date of issuance of the supplementary card to plaintiff, he has remitted payment for a number

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[2] *See* Exhibit 1 to defendant's Motion for Summary Judgment, Rec.Doc. # 6.

[3] *See* Exhibit 2 to Motion for Summary Judgment, *supra.*

[4] *See* Exhibit 3 to Motion for Summary Judgment, *supra.*

[5] *See* ¶ 3, defendant's Statement of Uncontested Material Facts, appended to Motion for Summary Judgment, *supra,* admitted in ¶ 3 of plaintiff's Opposition to Statement of Uncontested Material Facts, appended to his opposition memorandum, Rec.Doc. # 10.

of transactions with a total of seven personal checks. Payment for all other charges (excluding those currently disputed) was made by the company.[6]

6. A billing dispute arose over the following charges included on the combined billing statements sent to the company:[7]

(a) Three debits in the amount of $3.00 each and one debit in the amount of either $3.00 or $6.00 for charges made by plaintiff in July, August, September and October of 1975 for air flight insurance for trips conducted for business purposes.

(b) A debit of $20.00 representing, according to plaintiff, "a charge for Mr. John E. Koerner's card which was returned and for which credit was never given." This, presumably, was a renewal fee for a card no longer desired.

(c) A debit of $20.00, ultimately cancelled by a credit which plaintiff asserts was "a charge for a card of Ralph E. Koerner." The nature of the charge has not been established.

7. Although American Express communicated with the company regarding the alleged billing errors, the dispute remained unresolved on September 28, 1976. On that date, plaintiff was asked to speak by phone to a representative of American Express when he attempted to use his card for the purchase of an airline ticket at N.O. International Airport. Following conversation with the representative as requested, plaintiff was presented with his credit card cut in half. The purpose of the trip

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[6] *See* ¶ 9 of plaintiff's Answers to Interrogatories, Rec. Doc. # 21.

[7] *See* ¶¶ 3 through 9 of plaintiff's Answers to Interrogatories, *supra*.

for which the ticket was to be purchased was business related.[8]

Plaintiff argues that this withdrawal was in violation of the creditor's obligations established by § 161 of the TILA, 15 U.S.C. § 1666, which was added on October 28, 1974,[9] and became effective one year later.[10] Section 1666 regulates the conduct of cardholders and card issuers, among other creditors, relating to possible billing errors. Plaintiff also alleges that defendant has violated § 127 of the Act, 15 U.S.C. § 1637, which requires that periodic disclosures be made by creditor, and which plaintiff asserts "is made applicable to American Express through § 1666." Therefore, plaintiff will be able to proceed to the merits of his Truth in Lending claims only upon a determination that § 1666 is applicable in the present situation.

American Airlines, Inc. v. *Remis Industries, Inc.*, supra, on which plaintiff relies as being controlling,[11] dealt not

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[8] *See* ¶¶ 9 through 13 of Complaint, Rec.Doc. # 1.

[9] P.L. 93-495 was enacted on October 28, 1974 and consists of six titles. Title III—Fair Credit Billing—amended various provisions of the Act and added to it, as Chapter 4—Credit Billing—sections 161 through 171 [15 U.S.C. §§ 1666-1666(j)]. While the name "Fair Credit Billing Act" is in fact the short title for all of Title III of P.L. 93-495, it is the name popularly given to Chapter 4 of the Truth in Lending Act. (*See* Historical Notes following text of § 1666 in 15 U.S.C.S.). Section 135, 15 U.S.C. § 1645, also discussed in this opinion, was added to the TILA as part of Title IV of the 1974 legislation.

[10] § 308 of the TILA.

[11] The narrow holding of *Remis* is that 15 U.S.C. § 1643(a), which establishes a $50 limitation on cardholders' liability for fraudulent use of their cards, protects all credit card holders, individual and corporate alike.

with the 1974 amendments to the TILA but with the 1970 amendments, the first provisions of the Act to deal with credit cards. The 1970 credit card provisions include § 132 (15 U.S.C. § 1642), which prohibits the unsolicited issuance of cards, § 133 (15 U.S.C. § 1643), which limits the liability of cardholders for fraudulent use of their cards, and § 134 (15 U.S.C. § 1644), which establishes penalties for fraudulent use. These provisions are implemented by the Federal Reserve Board, the agency given regulatory and advisory powers under the Act,[12] which has promulgated Regulation Z.[13]

Since its enactment in 1968, the TILA has provided for a "business use exemption." The exemption is stated in § 104(1) of the Act, 15 U.S.C. § 1603(1), which reads:

> This title [15 U.S.C. § 1601 et seq.] does not apply to . . . [c]redit transactions involving extensions of credit for business or commercial purposes . . . .

The exemption is repeated in Regulation Z (12 C.F.R. § 226.3(a)). The history of the relationship between the exemption and the TILA's early credit card provisions is outlined in a letter from the Federal Reserve Board, which, in pertinent part, states:

> In administering [Regulation Z] staff at first interpreted [12 C.F.R. § 226.3(a)] to mean that credit cards used for business purposes were not subject to the provisions of § 226.13 . . . regarding issuance of credit cards and liability for unauthorized use. More extensive experience with the Act, however, indicated that the congressional intent and the purposes of the legislation would be better served by including such cards within the coverage of the sec-

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[12] 15 U.S.C. §§ 1604, 1607(d), 1608, 1609, 1613.

[13] See 12 C.F.R. Part 226—Truth in Lending. Section 226.13 relates to credit card transactions.

> tion, and Regulation Z was amended on December 12, 1972, to include credit cards issued for business purposes (§ 226.13(a)(4), renumbered as 226.2(m) . . .).[14]
>
> In its annual reports to Congress, the Board recommended that the Truth in Lending Act be amended to reflect this interpretation of the credit card provisions. Public Law 93-495 enacted on October 28, 1974, gave effect to this recommendation in § 410 [15 U.S.C. § 1645], which provides that the business purpose exemption of the Act does not apply to the credit card provisions. Therefore, a credit card issuer supplying cards to a company or its employees must comply with all relevant provisions of § 226.13 of Regulation Z. Federal Reserve Board Letter No. 898 of June 15, 1975 by Susan B. Collins, Attorney, Fair Credit Practices Section, *quoted in*, 5 CCH Consumer Credit Guide, ¶ 31,232.

On March 15, 1974, a time prior to the enactment of § 1645 which negates the operation of the § 1603 business use exemption in §§ 1642, 1643 and 1644, the opinion in *Remis*, supra, was rendered and provided a judicial pronouncement that § 1643(a)—limiting cardholders' liability for fraudulent use—applies to all cardholders, individual and corporate alike. Plaintiff's argument therein, that § 1603 excluded corporate cardholders from the protection afforded by § 1643, was rejected. The court viewed the argument as contrary to the uniform interpretation of the relationship between § 1603(1) and the 1970 credit card provisions voiced by the Federal

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[14] 12 C.F.R. § 226.2(m) reads: "Cardholder' means any person [person is defined to include both natural persons and organizations in 12 C.F.R. § 226.2(bb)] to whom a credit card is issued for personal, family, household, agricultural, *business, or commercial purposes* . . ." (Emphasis ours).

Reserve Board and the Federal Trade Commission and out of harmony with the expanded definition of "cardholder" provided by § 226.2(m) of Regulation Z. Further, plaintiff's argument foundered on principles of statutory construction. The court found that it was all but impossible to superimpose on the liability limitation statute the transaction-by-transaction analytical approach embodied within the business use exemption and, additionally, discarded a "predominant use" test as "wholly unwielding in application." [15] Thus, in the face of a conflict between the two sections of the TILA § 1643, unencumbered by § 1603(1), prevailed as the latest expression of legislative will.[16]

The issue raised by the instant motion is phrased by the parties as whether or not § 1603(1) is applicable to § 1666. Plaintiff argues that § 1603(1) is no more capable of being given effect in the enforcement of the 1974 amendments, including § 1666, than it would have been in the administration of the 1970 amendments and therefore asserts that § 1666 applies to card issuers in all instances. Defendant argues that the absence of an abjurement of the applicability of § 1603(1) to § 1666, enacted as a part of the Act which created § 1645,[17] reveals congressional intent to allow § 1603(1) to operate with respect to § 1666 and thereby exclude all business transactions.

For reasons stated below, we find that § 1666 provides its own internal qualifications, generally extending its coverage to all transactions accomplished by means of a credit card issued to a natural person under a

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[15] *American Airlines, Inc.* v. *Remis Industries, Inc., supra,* at 200-201.

[16] *Id.*

[17] *See* n. 2.

non-corporate account and excluding all others. Additionally, while we agree with *Remis* that a "purpose of use" test applied to each transaction is highly unsuited to the administration of credit card provisions and would similarly reject a "predominant use" test applied retrospectively at the litigation stage as an inadequate behavioral guide to card issuers and an unwieldy and inappropriate judicial tool, we cannot accept the implication in *Remis* that these approaches are the only ones available under § 1603(1). We find no conflict between the concurrent operation of the limitations imposed by §§ 1603(1) and 1666 and follow the rule of statutory construction stated in *Remis*:

> Effect is to be given to [provisions introduced by the amendatory act and those of the original section] . . . and they are to be interpreted so they do not conflict.

Remis, supra, at 200, and treatise cited therein.

At the outset, we note that the term "cardholder," expanded in 1972 to include corporate cardholders [18] is conspiciously absent within the confines of § 1666. Instead, the term "creditor," which is defined in 15 U.S.C. § 1602(f) to include card issuers,[19] in turn defined in § 1602(n) simply as any person or his agent who issues a credit card, is used throughout, with a correlative designation of the consumer as the "obligor." Section

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[18] *See* n. 14.

[19] Section 1602(f), as amended in 1974 by Title III of P.L. 93-495, reads in part: "For the purposes of the requirements imposed by Chapter 4 and [other sections of the Act], the term 'creditor' shall also include card issuers . . . and the Board shall, by regulation, apply these requirements to such card issuers, to the extent appropriate, even though the requirements are by their terms applicable only to creditors offering open end credit plans.

1666(a) sets forth a scheme for the orderly resolution of disputes over the correctness of statements transmitted by creditor to obligor "of the obligor's account in connection with an extension of *consumer credit.*" (Emphasis ours.) Billing errors, as defined in § 1666 (b), consist of computation errors, reflections of an extension of credit either not made to the obligor, not made in the amount shown for goods or services not accepted by or properly delivered to obligor, or for which additional clarification is needed, and any other error described in regulations of the Board.[20] Under § 1666 (d), creditors "operating an open end consumer credit plan" may not restrict or close an account solely because of obligor's failure to pay an amount in dispute, prior to the sending of a written explanation or clarification as required by the statute. A penalty of forfeiture of any right to collect the contested amount is imposed on creditors by § 1666(c).

The qualification which serves to limit the obligations of card issuers under § 1666 is contained in the statute's stipulation in § 1666(a) that statements of account containing potential discrepancies be connected with an extension of credit that is consumer in nature. Under the TILA, an "extension of credit" may be viewed as occurring at two points: at the opening of the account and issuance of the first card thereunder, and at the consummation of transactions for goods or services through card usage.[21] The term is used in both senses

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[20] Section 1666 is implemented by 12 C.F.R. § 266.14.

[21] The Act's definition of "credit" includes not only the right to defer payment on a debt, but also the right to incur debts and defer payment of them. 15 U.S.C. § 1602(e). Regulation Z's counterpart to this definition appears in 12 C.F.R. § 226.2(q) and was renumbered in 1970. *See* notation under "Amendments" following text of § 1602 of Title 15 in U.S.C.S.

within § 1666. Subsections (1) and (2) of § 1666(b), which defines billing errors, unquestionably speak of individual, accomplished transactions as extensions of credit. However, the term as used in § 1666(a), which governs the scope of cardholders' obligations established therein, can only refer to the extension of credit which occurs when the right to incur debts and defer payment is created at the opening of the account. The statute, as it pertains to cardholders, obviously was not designed to proceed on a transaction-by-transaction basis. An error in computation, for example, also defined as a "billing error" in 1666(b), cannot always be attributed to a single transaction. Nor could the "consumer" or "non-consumer" nature of a charge made by a person other than cardholder but mistakenly billed to cardholder's account, again a "billing error," be relevant to the scope of coverage. Further, a charge for the renewal of a card no longer desired represents no "transaction" at all. In addition, the prohibition provided by § 1666 (d) against restriction or closing of accounts addresses itself exclusively to creditors operating "an open end *consumer credit plan.*" (Emphasis ours.) Thus, it is the account (or the plan) and not individual transactions which must be characterized as consumer in nature in order to determine the section's applicability to card issuers.

The TILA's definition of the word "consumer" appears in 15 U.S.C. § 1602(h), which reads:

> The adjective "consumer," used with reference to a credit transaction, characterizes the transaction as one in which [1] the party to whom credit is offered or extended is a natural person, and [2] the money, property, or services which are the subject of the transaction are primarily for personal, family, household, or agricultural purposes.

The substance of this definition is reproduced in Regulation Z in its definition of "consumer credit." [22] These definitions, further adapted for present purposes, would be transformed into the following definition: a "consumer credit account or plan" is one offered to a natural person for non-business (but including agricultural) purposes. Because of the obvious potential for overlapping uses of a single card, it is appropriate that the definition incorporate a kind of "prospective predominant use" test, one applied at the opening of an account and based on the reasonably anticipated predominant use thereof.

Although we have no statistics to offer on the subject, we believe it may be reasonably said that, in the majority of credit card accounts opened in the name of individuals who assume sole liability for debts to be incurred, predominant usage for non-business purposes is contemplated. Short of a prospective expression by the parties involved negativing such an intent, these accounts should be characterized as consumer credit accounts. Business transactions conducted thereunder should not be allowed to nullify the protection afforded by § 1666. Nor is it anticipated that card issuers will be less than uniform in their handling of billing complaints due to the obvious difficulties of perceiving the nature of individual transactions as complaints are lodged and the consequences that could attend a wrong guess. Just as plainly, in the majority of accounts opened in the names of companies and relying in large part on company credit, such as the account involved in this litigation, it would be reasonable to anticipate predominant use for business or commercial purposes. If an occasional personal use of a corporate card had the effect of imposing

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[22] 12 C.F.R. § 226.2(p), renumbered in 1970. *See* notation under "Amendments" following text of § 1602 of Title 15 in U.S.C.S.

upon card issuers the obligations and penalties of § 1666 which otherwise are inapplicable to company accounts, the section's requirement that a "consumer credit plan" be involved could be rendered meaningless. Such accounts should not be considered "consumer" in nature.[23]

The TILA's general "business use exemption" contained in § 1603(1) can be read to provide the same general exclusion of corporate credit card accounts. The section operates to exempt from the TILA "credit transactions involving extensions of credit for business or commercial purposes." As previously noted, all transactions made through use of a card issued under a company plan involve "extensions of credit"—which, for the purposes of § 1666, means the right to incur debts and defer payment—for business or commercial purposes. Thus, all such transactions are exempted from § 1666 by § 1603(1). Conversely, transactions completed by use of a non-company card generally do involve "extensions of credit" for personal use and, by the negative implication of § 1603(1), are subject to the Act's requirements.

A letter from the Acting Chief of the Fair Credit Practices Section of the Federal Reserve Board reflects that agency's understanding that, unlike the 1970 amendments to the Act, the provisions of Chapter 4, added to the Act in 1974, have limited application to cardholders because of § 1603(1). There, the Board opined that,

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[23] On the company application for a supplementary card for plaintiff, he signed a standard, printed statement joining in the application and assuming joint and *in solido* liability for charges to be incurred. The character of this commitment was not discussed by the parties in these proceedings. If plaintiff's undertaking was intended to be in the nature of a guaranty or suretyship, the primary obligor being the company, as appears the case here, the requirement that credit be extended to a "natural person" also would bar classification of the account as a "consumer credit" one.

although Regulation Z defined "creditors" to include card issuers and defined "cardholders" to include corporate cardholders, the Fair Credit Billing Act (*see* n. 2) does not apply to card issuers in relation to corporate cardholders using the cards solely for business purposes. "This is so," the letter states, "in view of the exemption for credit extended to organizations for business or commercial purposes in § 226.3(a) [Regulation Z's counterpart to § 1603(1)]."[24] This administrative expression concerning the proper construction of the TILA, although not controlling, is to be afforded great weight.[25]

Additionally, although the extent of the coverage of the Fair Credit Billing Act vis-a-vis corporate cardholders was not a topic of Congressional discussion during consideration of the amending bills, there is evidence that the legislators understood and intended that such cardholders would not be included. First, throughout the history of the 1974 amendments to the Act,[26] statements of the need for the legislation to correct purportedly high-handed tactics of card issuers in their handling of billing complaints remained constant and unchallenged. While consumers were recognized as beneficiaries of the phenomenal growth of the credit card industry and the use of computerized billing systems, they were also depicted as victims of the new mechanism, frustrated in their attempts to have billing errors corrected through communications with a "robot," harassed by dunning letters, and prone to acquiesce in payment

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[24] Federal Reserve Board Letter No. 1004 of February 10, 1976, *quoted in*, 5 CCH Consumer Credit Guide, ¶ 31,338.

[25] *See American Airlines, Inc.* v. *Remis Industries, Inc.*, *supra*, at 202, and cases cited therein.

[26] *See* Appendix A attached—"1974 Amendments to the Truth in Lending Act," 8 Clearinghouse Rev. 851, at 851, n. 2.

when confronted with the creditors' powerful weapons of threats of ruination of credit ratings and institution of legal action against them.[27] The credit card explosion was demonstrated by statistics which indicated that one-half of all American families used at least one credit card[28] and that, for the average family, charge accounts and monthly bill paying have become a way of life.[29] Perhaps because of the greatly diminished effectiveness of the creditors' weapons when levelled at businesses, the focus was placed on, and the legislation apparently was intended to protect, the family man in his personal dealings. The terms "consumer" and "consumer credit transactions" were used throughout[30] and, as terms of art in the context of the Truth in Lending Act, should be received in their restricted meaning to exclude corporate cardholders and transactions conducted under a commercial account.

Second, when the amendments were reintroduced in the Senate in February of 1973, they incorporated a section which was to become § 1645 of the Act. The text of the proposed new provision (to which amendments not relevant here were later made) read:

> The provisions of section 104(1) [15 U.S.C. § 1603 (1)] shall not apply to sections 132, 133, and 134 [15 U.S.C. §§ 1642, 1643, and 1644]. 119 Cong. Rec. S. 2820 (daily ed. Feb. 20, 1973) § 210.

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[27] *See* S.Rep. No. 92-750, 92d Cong., 2d Sess. (1972), at 2-4, 118 Cong. Rec. S. 6886 (daily ed. Apr. 27, 1972), 119 Cong. Rec. S. 2803-2805 (daily ed. Feb. 20, 1973), S. Rep. No. 93-278, 93d Cong., 1st Sess. (1973), at 5-6, 119 Cong. Rec. S. 14404 (daily ed. July 23, 1973).

[28] *See, e.g.*, S. Rep. No. 93-278, *supra*, at S. 2803.

[29] *See* 119 Cong. Rec. S. 2804 (daily ed. Feb. 20, 1973).

[30] *See* n. 27.

The proposed statute was among those drafted by the Federal Reserve Board and recommended to Congress in the Annual Report of the Board for the year ending December 31, 1972, which was ordered printed in the Congressional Record for that date. In pertinent part, it states:

> . . . To clarify the matter [of whether the TILA's business exemption applied to the prohibition against the unsolicited issuance of credit cards and to the $50 limit on liability for their unauthorized use], the Board amended section 226.13 of Regulation Z to provide that each credit card, regardless of whether issued or used for personal, family, household, agricultural, business or commercial purposes, and regardless of whether issued to a natural person, corporation, or other business entity is covered by [§§ 1642, 1643, and 1644]. *These amendments do not affect the business exemption in its application to the disclosure*, recission and advertising *requirements.* (Emphasis ours.)

119 Cong. Rec. S. 2811-12 (daily ed. Feb. 20, 1973). The portion of the annual report underscored in the passage quoted above indicates that the legislators were well aware that the listing of sections to which the business exemption would not apply under authority of the proposed § 1645 was exclusive and that the exemption would continue to operate in § 1637, which prescribes the disclosure obligations of creditors. Section 1637, under the legislation being considered, was to be amended to require that disclosures be made to obligors stating the creditors' responsibilities with regard to handling of billing errors as they would be established by Chapter 4.[31]

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[31] *See* 119 Cong. Rec. S. 2818, § 104 (daily ed. Feb. 20, 1973). The added provision appears at 15 U.S.C. § 1637 (a) (8).

It would indeed be anomalous to conclude that Congress intended § 1666 to afford protection to corporate cardholders when it failed to require that disclosures regarding the rights created by § 1666 be made to that segment of the cardholding population.

Thus, we find that § 1666 is inapplicable to defendant in its status as a card issuer extending credit under a non-consumer, company account. No investigation need be made into the subjective motivation behind each instance of card use which may be linked causally to the revocation of plaintiff's card. We hold that plaintiff has failed to state a cause of action under the federal Truth in Lending Act.[32] Additionally, we again note plaintiff's concession that his state claims do not involve the amount required for diversity jurisdiction.[33] Plaintiff's objections to the Magistrate's Report and Recommendations are overruled and, accordingly, defendant's Motion for Summary Judgment of dismissal of plaintiff's alleged federal and state claims is GRANTED.

Judgment shall be entered in favor of defendant, dismissing plaintiff's complaint at his costs.

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[32] There is no merit to plaintiff's contention that American Express should be estopped from raising the defense of exclusion because it had sent to plaintiff a statement of obligors' rights under the statute. The parties cannot create a federal right and thereby confer jurisdiction on the courts. Wright & Miller, Federal Practice and Procedure: Civil § 3522 at 46-47.

[33] *See* n. 1.

APPENDIX A

1974 AMENDMENTS TO THE TRUTH IN LENDING ACT

By National Consumer Law Center, Inc.*

I. INTRODUCTION

The Truth in Lending Act (TILA) was significantly amended on October 28, 1974. Because many of the amendments apply to pending TILA lawsuits, the amendments should be studied closely by anyone contemplating or pursuing TILA litigation.[1] This article summarizes the amendments to the TILA disclosure provisions and their legislative history, and examines the issues which may effect low income consumers.

The Act contains many provisions other than TILA disclosure amendments which are not the subject of this article but which should be noted by consumers and their lawyers. These provisions establish rights for consumers faced with billing errors, restrict sex discrimination in the extension of credit, amend banking regulations, and create a National Commission on Electronic Funds Transfers. The provisions on billing errors and sex discrimination will not become effective until October 28, 1975, allowing time for the Federal Reserve Board (FRB) to promulgate regulations.

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* One Court Street, Boston, Mass. 02108, (617) 523-8010.

[1] The text of P.L. No. 93-495 may be found at: 88 Stat. 1500; 43 U.S.L.W. 127, 130-135 (December 10, 1974); 12 *U.S. Code Cong. & Admin. News* 1974: 5684, 5697-5714 (December 15, 1974); and 1 *CCH Consumer Credit Guide* ¶¶ 3005-3065 (December 10, 1974) (Titles III and IV only).

The 1974 TILA amendments were passed by means of a legislative shortcut which considerably diminished their consideration by the House of Representatives.[2] The

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[2] The history of the 1974 TILA amendments began with a bill introduced in the Senate during the first session of the 92d Congress on February 8, 1971, by Senators Proxmire and Brooke. The Senate Subcommittee on Financial Institutions held hearings on October 26-29, 1971, and executive sessions on March 7-8, 1972. The full Senate Committee on Banking, Housing and Urban Affairs met in executive session March 15, 1972 and favorably reported out S.652 with some amendments. S. REP. No. 92-750, 92d Cong., 2d Sess. (1972). The Senate passed S.652 on April 27, 1972, after extensive debate. *See* 118 CONG. REC. S.6882-6928 (April 27, 1972). However, the bill died because the House took no action on the bill during the 92d Congress after its referral to the House Committee on Banking and Currency on May 1, 1972.

TILA amendments were reintroduced, on February 20, 1973, as S.914 in the first session of the 93d Congress. *See* 119 CONG. REC. S.2803-2820 (Feb. 20, 1973). Several alternative and related bills were also introduced. Senators Sparkman (D. Ala.) and Brock (R. Tenn.) introduced alternative bill S.1630 on April 18, 1973.

The new Senate Subcommittee on Consumer Credit held hearings on S.914 and S.1630 on May 21-24, 1973, and met again June 19-20, recommending a revised bill to the full Senate Committee on Banking, Housing and Urban Affairs which included provisions of both S.914 and S.1630. The full Committee met June 27, 1973 and, after amending the revised bill recommended by the Subcommittee, added a new Title III on equal credit opportunity that incorporated the substance of S.867 and S.1605. The Committee then reported out a clean bill numbered S.2101. S. REP. No. 93-278, 93d Cong., 1st Sess. (1973).

During debates on the revised and renumbered bill S.2101 held on July 23, 1973, the Senate rejected amendments offered by Senators Proxmire and Moss (D. Utah) and approved minor amendments offered by Senator Brock. *See*

Senate had considered and passed several bills to amend the TILA since 1971, generating committee hearings and reports. However, those bills died without House action. The last Senate bill concerning TILA amendments (S. 2101) was appended to a House bill on depository institutions (H.R. 11221) and passed the House virtually without debate. The act was signed by President Ford on October 28, 1974, and most of the TILA amendments became effective on that date.[3] Three amendments—disclosure of real estate closing costs, codification of the Regulation Z "more than four instalment" rule, and identification of open end transactions within periodic statements—will become effective one year later, October 28, 1975.

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119 CONG. REC. S.14403-14431 (July 23, 1973). The bill then passed the Senate and was referred to the House where it languished in the House Banking Committee for the next year.

On June 13, 1974 the Senate unanimously passed H.R. 11221 concerning depositary institutions, to which the provisions of S.2101 had been appended. *See* 120 CONG. REC. S.10551-10582 (June 13, 1974). On October 4, 1974 Rep. Patman (D. Tex.) filed the House conference report on H.R. 11221. *See* 120 CONG. REC. H.9935-9994 (October 4, 1974). The House passed Bill 355-1 on October 9, 1974, over the heated objection of Reps. Sullivan (D. Mo.) and Eckhardt (D. Tex.) that newly added sections, including the TILA amendments, had never been the subject of full House debates. *See* 120 CONG. REC. H.10269-10281 (Oct. 9, 1974). The Senate approved the conference report on October 10, 1974. *See* 120 CONG. REC. S.18754 (Oct. 10, 1974). The bill was signed into law by President Ford on October 28, 1974.

[3] *See* text accompanying nn. 46-52 for additional discussion of effective date.

II. CODIFICATION OF EXISTING CASE LAW

Most of the TILA amendments comprise substantive changes in the law. These will be discussed below. However, two amendments merely codified existing case law and require only brief mention. First, amended TILA Subsections 125(a) and (b)[4] affirm that the term "security interest" as used in the TILA includes liens arising by operation of * * *.

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[4] 15 U.S.C. §§ 1635(a) and (b).

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SECTION "D"

Civil Action No. 76-3660

LOUIS R. KOERNER, SR., Individually and on behalf of all others similarly situated

versus

THE AMERICAN EXPRESS COMPANY

JUDGMENT

Considering the Court's Memorandum Opinion and Order filed herein,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, The American Express Company, and against plaintiff, Louis R. Koerner, Sr., Individually and on behalf of all others similarly situated, dismissing plaintiff's complaint at his costs.

New Orleans, Louisiana, this 9th day of December, 1977.

/s/ Nelson B. Jones
NELSON B. JONES
Clerk

Approved as to form:

/s/ Edward Boyle, Sr.
United States District Judge

APPENDIX E

Sections 104(1) and 161 of the Truth-in-Lending Act, 15 U.S.C. § 1603(1) and 1666 (1976):

§ 104. Exempted transactions

This subchapter does not apply to the following:

(1) Credit transactions involving extensions of credit for business or commercial purposes, or to government or governmental agencies or instrumentalities, or to organizations.

(Pub. L. 90-321, Title I, § 104, May 29, 1968, 82 Stat. 147.)

§ 161. Correction of billing errors.

(a) If a creditor, within sixty days after having transmitted to an obligor a statement of the obligor's account in connection with an extension of consumer credit, receives at the address disclosed under section 127(b)(11) of this title a written notice (other than notice on a payment stub or other payment medium supplied by the creditor if the creditor so stipulates with the disclosure required under section 127(a)(8) of this title) from the obligor in which the obligor—

(1) sets forth or otherwise enables the creditor to identify the name and account number (if any) of the obligor,

(2) indicates the obligor's belief that the statement contains a billing error and the amount of such billing error, and

(3) sets forth the reasons for the obligor's belief (to the extent applicable) that the statement contains a billing error,

the creditor shall, unless the obligor has, after giving such written notice and before the expiration of the

time limits herein specified, agreed that the statement was correct—

(A) not later than thirty days after the receipt of the notice, send a written acknowledgement thereof to the obligor, unless the action required in subparagraph (B) is taken within such thirty-day period, and

(B) not later than two complete billing cycles of the creditor (in no event later than ninety days) after the receipt of the notice and prior to taking any action to collect the amount, or any part thereof, indicated by the obligor under paragraph (2) either—

(i) make appropriate corrections in the account of the obligor, including the crediting of any finance charges on amounts erroneously billed, and transmit to the obligor a notification of such corrections and the creditor's explanation of any change in the amount indicated by the obligor under paragraph (2) and, if any such change is made and the obligor so requests, copies of documentary evidence of the obligor's indebtedness; or

(ii) send a written explanation or clarification to the obligor, after having conducted an investigation, setting forth to the extent applicable the reasons why the creditor believes the account of the obligor was correctly shown in the statement and, upon request of the obligor, provide copies of documentary evidence of the obligor's indebtedness. In the case of a billing error where the obligor alleges that the creditor's billing statement reflects goods not delivered to the obligor or his designee in accordance with the agreement made at the time of the transaction, a creditor may not construe

such amount to be correctly shown unless he determines that such goods were actually delivered, mailed, or otherwise sent to the obligor and provides the obligor with a statement of such determination.

After complying with the provisions of this subsection with respect to an alleged billing error, a creditor has no further responsibility under this section if the obligor continues to make substantially the same allegation with respect to such error.

(b) For the purpose of this section, a "billing error" consists of any of the following:

(1) A reflection on a statement of an extension of credit which was not made to the obligor or, if made, was not in the amount reflected on such statement.

(2) A reflection on a statement of an extension of credit for which the obligor requests additional clarification including documentary evidence thereof.

(3) A reflection on a statement of goods or services not accepted by the obligor or his designee or not delivered to the obligor or his designee in accordance with the agreement made at the time of a transaction.

(4) The creditor's failure to reflect properly on a statement a payment made by the obligor or a credit issued to the obligor.

(5) A computation error or similar error of an accounting nature of the creditor on a statement.

(6) Any other error described in regulations of the Board.

(c) For the purposes of this section, "action to collect the amount, or any part thereof, indicated by an obligor under paragraph (2)" does not include the sending of

statements of account to the obligor following written notice from the obligor as specified under subsection (a) of this section, if—

(1) the obligor's account is not restricted or closed because of the failure of the obligor to pay the amount indicated under paragraph (2) of subsection (a) of this section, and

(2) the creditor indicates the payment of such amount is not required pending the creditor's compliance with this section.

Nothing in this section shall be construed to prohibit any action by a creditor to collect any amount which has not been indicated by the obligor to contain a billing error.

(d) Pursuant to regulations of the Board, a creditor operating an open end consumer credit plan may not, prior to the sending of the written explanation or clarification required under paragraph (B)(ii), restrict or close an account with respect to which the obligor has indicated pursuant to subsection (a) of this section that he believes such account to contain a billing error solely because of the obligor's failure to pay the amount indicated to be in error. Nothing in this subsection shall be deemed to prohibit a creditor from applying against the credit limit on the obligor's account the amount indicated to be in error.

(e) Any creditor who fails to comply with the requirements of this section or section 162 forfeits any right to collect from the obligor the amount indicated by the obligor under paragraph (2) of subsection (a) of this section, and any finance charges thereon, except that the amount required to be forfeited under this subsection may not exceed $50.

(Pub. L. 90-321, Title I, § 161, as added Pub. L. 93-495, Title III, § 306, Oct. 28, 1974, 88 Stat. 1512.)

APPENDIX F

Section 226.3(a) of Regulation Z, 12 C.F.R. § 226.3 (a):

§ 226.3 Exempted transactions.

This part does not apply to the following:

(a) *Business or governmental credit.* Extensions of credit to organizations, including governments, or for business or commercial purposes, other than agricultural purposes.

APPENDIX G

Federal Reserve Board Public Information Letters Pertaining to the "Business or Commercial Purpose" Exemption:

No. 277

Rescission—security interest in guarantor's home in business transaction

March 10, 1970

We are pleased to respond to your letter in which you ask several questions regarding the application of the Truth in Lending provisions to a commercial credit transaction in which a corporation is the customer but in which the principal shareholder of the corporation guarantees the loan and provides his principal residence as security for the loan.

The Truth in Lending Act and Regulation Z, which was promulgated by the Board to implement the Act, covers only credit which is granted for personal, family, household, or agricultaral purposes. Credit granted for business purposes is specifically exempted from Truth in Lending as provided in Section 104(1) of the Act and in Section 226.3(a) of Regulation Z. Therefore, if the transaction described in your letter is a credit transaction for business purposes, then that transaction would be exempt from the provisions of the Truth in Lending Act and Regulation Z, and no disclosures would need to be made to the guarantor nor would it be necessary to provide the guarantor with notice of right of rescission.

Very truly yours,

Kenneth A. Kenyon
Deputy Secretary

* * * *

No. 663

BUSINESS PURPOSE LOAN SECURED BY PERSON'S ANTIQUES
Sec. 226.2(k)
Sec. 226.3(a)

January 23, 1973

In your letter of January 11, 1973, you described a transaction and questioned whether it is subject to Truth in Lending's Regulation Z. You indicate that the loan transaction is for "commercial" purposes and the proceeds are intended to be used for the completion of construction of a building to be used in business. However, the loan is secured by antiques which are used for personal, family or household purposes and will be kept in the home of the borrower.

Section 226.3(a) of Regulation Z specifically exempts from coverage extensions of credit for business or commercial purposes, other than agricultural purposes. Consequently, if the purpose of the transaction is indeed a business or commercial purpose, the transaction would be exempt from the coverage of Truth in Lending, regardless of the property used to secure the obligation. The purpose of the transaction, not the security involved, is controlling in determining whether it is subject to Regulation Z.

Jerauld C. Kluckman
Accountant-Analyst

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No. 727

CREDIT CARDS ISSUED JOINTLY TO EMPLOYEE AND CORPORATION
Sec. 226.3(a)
Sec. 226.6(e)
Sec. 226.7(b)

November 13, 1973

Your note asked for suggestions in responding to the June 15, 1973, letter of relating to the agreement. The agreement provides that in the case of a "supplementary card" (a card issued to an employee of a company in his own name and in the name of the company) will bill only the employer, although both the employer and the employee are jointly and severally liable on all obligations incurred under the account. The question is whether § 226.7(b) of Regulation Z requires to send a periodic billing statement to the employee as well as to the employer.

The key question seems to be to whom credit is extended, and whether it is "consumer credit" as opposed to business credit. If credit is extended to the company, then the entire transaction is exempt from Truth in Lending under § 226.3(a). However, if credit is extended to the employee as well as the company, the question arises as to whether the credit is for business or commercial purposes, or whether it is primarily for personal, family, household, or agricultural purposes. If the credit is for business or commercial purposes, it would not be subject to Truth in Lending by virtue of the exemption in § 226.3(a). On the other hand, if the purpose of the credit is mixed but primarily for personal, family, household or agricultural purposes, the credit would be subject to Truth in Lending's provisions. However, we suspect tha

few cards, if any, which are issued with a corporation as a cardholder would fall within this category.

If the account does fall within the disclosure provisions of the Regulation, there would appear to be a single "customer" on the account since there is only one "natural person" (see § 226.2(o)) and the provisions of § 226.6(e) relating to multiple customers would not apply. In such cases, although the employee would be the nominal party entitled to disclosures, we believe that these disclosures could be sent to him within the requirements of § 226.7(b) by sending them to the company's address, since that address is apparently the address designated by the parties for delivery of the disclosures.

Griffith L. Garwood
Adviser

* * * *

No. 751

RESIDENCE GIVEN AS SECURITY FOR BUSINESS LOAN-EXEMPT
Sec. 226.3(a)
RESIDENCE GIVEN AS SECURITY FOR BUSINESS LOAN-EXEMPT FROM BOTH DISCLOSURE REQUIREMENTS AND RESCISSION RIGHTS OF REG. Z
Sec. 226.9(a)

January 14, 1974

This is in response to your letter of January 7, 1974, which questions the application of Regulation Z to a second mortgage taken on the home of a husband and wife to secure a loan taken by the husband exclusively for business purposes. You indicate that the husband and wife own their home as joint tenants with rights of survivorship, thereby requiring both signatures, if the

incumbrance against the home is to be valid. You question whether a copy of the Truth in Lending disclosure statement and two copies of the notice of the right of rescission need to be given to the couple.

It is staff's view that the credit transaction in question is not subject to Truth in Lending. Section 226.3(a) of Regulation Z specifically exempts from coverage extensions of credit for business or commercial purposes, other than agricultural purposes. Consequently, if the purpose of the transaction is indeed business or commercial, the transaction would be exempt from coverage, regardless of the nature of the title in the property used to secure the obligation. The purpose of the transaction, not the security involved, is controlling in determining whether it is subject to Regulation Z. Therefore, no Truth in Lending disclosures need be made.

Jerauld C. Kluckman
Chief
Truth in Lending Section

* * * *

No. 821

APPLICATION OF EXEMPTION AS TO TRANSACTIONS IN SECURITIES WITH AN SEC BROKER-DEALER
Sec. 226.3(a)
Sec. 226.3(b)

July 18, 1974

This is in response to your letter of June 4, inquiring whether the exemption provided under § 226.3(b) of Regulation Z is the only exemption available where a credit transaction involves securities.

The exemption provided under § 226.3(b) relates to transactions involving a specified type of creditor, a "broker-dealer registered with the Securities and Exchange Commission." Thus, where securities or commodity accounts are the subject of a credit transaction with a broker-dealer registered with the SEC, all such credit transactions are exempt by virtue of § 226.3(b). However, the exemptions under § 226.3(a) and (c) may also apply to other security credit transactions not eligible for exemption under § 226.3(b). For example, a credit transaction is considered to be for business or commercial purposes if credit to buy securities is extended to the individual in his business capacity as a merchant, in order to supplement the income of the business for business purposes. Likewise, a credit transaction of more than $25,000 to purchase securities would be exempt if the transaction is not secured by real property.

It is difficult to draw a clear line between credit for personal, family, household, or agricultural purposes and credit for business or commercial purposes where the obligor is a natural person. In situations where there is an element of doubt as to what course to follow, it would seem to be in a creditor's interest to err on the side of making unnecessary disclosures rather than risk the possible consequences of failing to make them.

Jerauld C. Kluckman
Chief
Truth in Lending Section

No. 1004

§ 226.3(a) Fair Credit Billing provisions do not apply to credit cards issued to corporation for business purposes but card issuer is subject to credit card provisions of §§ 13(a) through (h)

§ 226.13 " " " " "

§ 226.14(a)

§ 226.14(g)

February 10, 1976

This is in response to your letter of . . . , concerning the applicability of the Fair Credit Billing Act amendments of Regulation Z to issuers of credit cards to corporate cardholders. Because the definition of creditor in § 226.2(s) of Regulation Z includes card issuers for purposes of Fair Credit Billing and the definition of cardholder in § 226.2(m) includes a person holding a card issued for business or commercial purposes, you question whether the requirements of Fair Credit Billing apply to the card issuer in relation to these corporate cardholders.

From the information you provided, the credit card company, "card issuer," enters into a contract to provide credit cards to another company, "cardholder," for use by the cardholder's employees. The cards are embossed with the name of the cardholder company and the employee. The cards are used by the employees to purchase goods or services required for the performance of their job. The cardholder is liable for payment of the goods or services purchased with the card, and the employee is never sent an invoice or periodic statement.

It is the opinion of staff, based on the fact situation outlined, that the requirements of Fair Credit Billing do not apply to card issuers in relation to corporate cardholders using the cards for business or commercial pur-

poses. This is so in view of the exemption for credit extended to organizations for business or commercial purposes in § 226.3(a). However, as I am sure you are aware, there are certain special requirements contained in § 135 of the Act on the issuance of credit cards and on liability for unauthorized use which apply to cards used for business or commercial purposes. These provisions are implemented in § 226.13 of Regulation Z. In the opinion of staff, the requirements of § 226.13(a) through (h) would apply to the card issuer in this case. Enclosed is a copy of Public Information Letter 716, which deals with a card issuer and corporate cardholder in a similar situation to the one you described. I have included the letter for your information in the hope that it may answer certain questions you might have about the application of § 226.13(a) through (h).

D. Edwin Schmelzer
Acting Chief
Fair Credit Practices Section

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